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No. 195

IN THE

Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA,

Petitioner

v.

BANK OF NEW YORK AND TRUST COMPANY

MEMORANDUM FOR RESPONDENT IN ANSWER TO "SUPPLEMENT" TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Upon the very day of the reassembling of the Court, petitioner served what purports to be a "supplement" to the petition filed on July 8, 1935 and replied to on July 27, 1935. Respondent's counsel know of no authority supporting such practice in reopening the argument. If such "supplement" is to be received and considered, respondent asks that the following observations in answer thereto be likewise received and considered.

I

Jurisdiction

It is the respondent's position, as held by the court below (R. 188-189), that the pending state court suit, instituted by Paul Lucke prior to the instant suit, is a suit quasi in rem, having for its sole object the disposition of the property in question (R. 32); that the instant suit by the petitioner, asserting a claim to the whole of the same property, is a suit quasi in rem notwithstanding a prayer for an accounting which is improper if the prior state court suit is one quasi in rem (*Waterman* v. *Canal-Louisiana Bank,* 215 U. S. 33, 44-46); that hence there is applicable the doctrine of priority of jurisdiction in suits quasi in rem, and the federal district court was without jurisdiction of the instant suit. Petitioner's "supplement" (pp. 17-21) challenges respondent's position upon certain grounds which respondent herewith answers.

Petitioner's "supplement" (p. 2) states that respondent apparently concedes that if the property in question formerly belonged to the Soviet government and now belongs to the United States, "the state courts are without jurisdiction over that property." Respondent not only does not so concede, but expressly challenges the contention. The questions of jurisdiction and of the existence of a cause of action are distinct. Respondent contends that the state court, prior to the

beginning of the instant suit, had jurisdiction over the property in question irrespective of the effect of the Soviet decrees.

Petitioner asserts that the doctrine of priority of jurisdiction is not applicable to the situation here presented (pp. 17-21); that even if the instant suit be deemed a suit in rem or quasi in rem, there is no conflict with any *existing* suit in rem or quasi in rem in the state court. Petitioner further contends that the instant suit is not in rem or quasi in rem, but is in personam.

(a) Petitioner states (p. 17) that the state courts "never acquired jurisdiction over these surplus funds." Petitioner's suggestion relates only to the jurisdiction of the state court in the liquidation proceedings, petitioner asserting that the possession of the Superintendent of Insurance was not the custody of the court. The point is immaterial in any aspect because the jurisdiction of the state court is sustained by the existing jurisdiction in the pending suit brought by Mr. Lucke (R. 22-34) prior to the instant suit. But the possession of the property by the Superintendent of Insurance as liquidator under the N. Y. statute (former Section 63 of the Insurance Law) was equivalent to custodia legis. Such liquidator is an ancillary receiver, a receiver pendente lite, of the property of a foreign corporation (former N. Y. Ins. Law, sec. 63, subds. 4 and 5, now L. 1932, ch. 191, art. XI, secs. 400-428, in substitution

for former sec. 63 repealed; *Matter of People* [*Russian Reinsurance Co.*], 255 N. Y. 415, 424, 423; *Matter of People* [*City Eq. Fire Ins. Co.*], 238 N. Y. 147, 156).[1] The expression of a district court in *Farrell* v. *Stoddard* (1 F. [2d] 802, 803), cited by petitioner (p. 18) as to a different status of the Superintendent of Insurance under the state statute, was made prior to the contrary view of the N. Y. Court of Appeals (*Matter of People* [*Russian Reinsurance Co.*], 255 N. Y. 415, 424, 423), and is contrary to recent decisions of the Circuit Court of Appeals, 2d Circuit (*Jacoby* v. *Bond & Mortge. Co.*, 72 F. [2d] 420, 423; *Tolfree* v. *N. Y. Title & Mortge. Co.*, 72 F. [2d] 702, 704), in each of which cases it is said:

> "By virtue of the order and article 11[2] of the Insurance Law the Superintendent became in effect a receiver under the supervision of the state court and the property under his control became in custodia legis" (citing cases). "In such circumstances, under established rules of law, the federal courts should not interfere with the possession of the state court" (citing cases).

(b) Petitioner contends that even if the state court acquired custody of the property at the time of the liquidation proceeding, that court did not acquire any *juris-*

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[1] The statute expressly provided (N. Y. Ins. Law, sec. 63, subd. 5) that "the rights and duties of the said superintendent with reference to such corporation and its said assets shall be those heretofore exercised by and imposed upon ancillary receivers of foreign corporations in this state" and the possession of the Superintendent was to be "for the benefit of its creditors and for such other relief as the nature of the case and the interests of its policyholders, stockholders or the public may require" (subd. 4).

[2] Article XI of the Insurance Law (L. 1932, ch. 191, secs. 400-428) now includes what was formerly sec. 63 of the old statute without material change. See new sections 406 and 408.

diction to adjudicate rights or title to such funds due to the fact that said funds then belonged to a foreign sovereign (the then unrecognized Soviet regime) which at no time had submitted itself or its property to the jurisdiction of the state court. The answer to this suggestion is that the court had the property under its control and could do what is pleased with it (*Sands* v. *E. S. Greeley & Co.*, 88 Fed. 130).

(c) Petitioner contends that even if the state court did acquire jurisdiction and custody in the liquidation procedings, it lost such jurisdiction and control when the funds were handed over to the respondent on April 18, 1933 (R. 6, 7). Even assuming that it did, the state court again obtained jurisdiction over the funds when, on the following day, April 19, 1933, the instant state court suit was begun by Mr. Lucke, the sole surviving director of the Russian corporation and conservator of its property (R. 15, 22). Such state court proceeding was a suit to determine the disposition of the property so deposited with the respondent (R. 32) and was thus a proceeding quasi in rem. As the order in the prior liquidation proceeding had directed that the funds deposited with the respondent were not to be withdrawn except upon the order of a court of competent jurisdiction (R. 55), and as the funds were in safe custody with the respondent, there was no necessity for the appointment of any receiver, which would have been wasteful.

(d) Petitioner contends that even if the state court did obtain jurisdiction on April 19, 1933 through the

pending suit in which Mr. Lucke is plaintiff, on November 16, 1933, the date of recognition and of the "Litvinov" correspondence, the state court lost that jurisdiction because, as is claimed by petitioner, title then vested in the petitioner as assignee of the Soviet government. The answer to the foregoing contention is that nothing which outside parties, sovereigns or anybody else, could do, would oust the state court of its then *jurisdiction* over the property subject to its control.

(e) Petitioner contends that the instant suit is not in rem, but is in personam. As said by the court below, "Nor is there any question here of the personal liability of the defendant (respondent) apart from what may attach solely from the fact that a fund in the custody of the state court, to which plaintiff (petitioner) makes claim, has been placed in its possession under the order of the state court" (R. 188). That the instant suit improperly asks for an account does not make the suit one in personam. This Court has held that where the state court has first acquired jurisdiction over the *res*, a federal district court has no jurisdiction over the *res* or to direct an account (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). All that the district court could do, if the instant suit were one in personam, would be to determine petitioner's claim of title, such determination, if favorable in any respect to the petitioner, to be then presented to the state court for appropriate action thereon (such as marshalling to protect prior equities or liens incurred in the state court proceeding). But the instant suit is not in personam. It is brought for the purpose of asserting a claim to the whole of the funds now in the jurisdiction and control of the

state court and is not brought for the purpose of asserting any personal claim against the respondent other than as the depositary of such funds.

(f) Petitioner asserts that the *only* theory upon which the respondent contends that the pending proceeding in the state court is in rem is that such proceeding is a "continuation of the original liquidation proceeding instituted and carried out by the Superintendent of Insurance." This is not so. The respondent's contention is that when, on April 19, 1933, Mr. Paul Lucke, the surviving director of the Russian corporation and conservator of its property, began the pending suit in the state court for a determination of the disposition of these funds (R. 22-34), the state court then obtained jurisdiction, and that such suit was in its nature one quasi in rem, which jurisdiction may not be ousted or superseded by a subsequent suit in the federal court, likewise in its nature quasi in rem as is the instant suit. It thus becomes unnecessary to discuss whether or not such suit by Mr. Paul Lucke may or may not be regarded, under all the circumstances, as a continuation of the liquidation proceedings as directed by the N. Y. Court of Appeals. In the liquidation proceedings, the Superintendent had paid the claims of the domestic policyholders before the case got before the N. Y. Court of Appeals for final decision and subsequently, pursuant to the direction of the Court of Appeals as carried out by the state court order of August 11, 1931 (R. 50, 52), the Superintendent determined and paid the claims of such foreign creditors as had filed their claims with him prior to the date of the order. To say, as petitioner

does (p. 21) that the Superintendent's authority ended when he had paid the domestic policyholders and creditors, is to show an unfamiliarity with the legal and factual situation.

Petitioner contends that the decision of the court below is in conflict with the decision of another Circuit Court of Appeals in a similar case and that the writ of certiorari should be granted to resolve the alleged conflict. There is no conflict to resolve, and the respective situations are not similar.

Brown v. *Duffin* (13 F. [2d] 708), the case referred to, held that a suit for an accounting where no receiver had been appointed was a suit in personam and not in rem and that "a judgment that defendant first account, and then pay over, is a judgment in personam." It may be admitted that if the instant suit, in form for an accounting, had been the first to be brought, thus making the prayer for an accounting a proper one, it would be a suit in personam, and the prayer for an accounting would be regarded as determinative of the nature of the suit. But this Court has decided that a suit for an accounting in a federal court cannot be maintained if brought subsequent to a suit in rem or quasi in rem in the state court, irrespective of a prayer in the bill for an accounting (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). Therefore, the fact that the prior and pending state court suit is a suit quasi in rem precludes, *as matter of law*, the instituting of a suit for an accounting in the federal court irrespective of the prayer in the bill. The instant suit, in the light most

favorable to the petitioner, may only be considered as a suit for the determination of petitioner's claim of title to the whole of the funds then within the control of the state court. In such aspect the instant suit is one quasi in rem and the rule of priority of jurisdiction is applicable and the instant suit will not lie.

The point is that there is no conflict between the decision below and the *Brown* case. The recent decision of this Court in *Penn General Casualty Co.* v. *Pennsylvania* (294 U. S. 189) clearly states the law.

II

The Effect of the Soviet Decrees

The petitioner's whole argument is based upon the assumption, disputed by the respondent, that the property in question formerly belonged to the Soviet government and now belongs to the United States. The alleged title of the Soviet government is based solely upon Soviet decrees of confiscation allegedly operating upon property outside the territorial jurisdiction of the Soviet government. To sustain such title, this Court would necessarily have to hold that the confiscation decrees of a foreign government may operate upon and transfer title to property actually located in a state of the United States, contrary to the declared public policy of such state and contrary to the decisions of the highest court of such state denying the title of the confiscating foreign state. Respondent repeats what it stated in its original brief herein, that no case has been cited nor can be cited, where any court of this country

has upheld a title based on confiscation except a case—not such as the instant case—where the property confiscated was within the territorial jurisdiction of the confiscating government.

The suggestion of the petitioner, as contained at pages 12 and 13 of the supplement to petition, to the effect that the fund, consisting of state, municipal or federal obligations on deposit in the State of New York, or the proceeds thereof, now represented by deposits in a New York state bank, is not in law to be deemed to be situated within the State of New York but is to be regarded as having its situs in Russia, is directly contrary to the decision of this Court in *Security Savings Bank* v. *California* (263 U. S. 282). In such case, it was held by this Court that the State of California has full dominion over deposits in a California savings bank even though the depositors or their heirs or legal representatives may reside elsewhere. Under the principles of the decision in the *Security Bank* case, the State of New York has full dominion over the funds now in the custody of the respondent Bank of New York and Trust Company, even to the extent of asserting, on its own behalf, a claim by way of escheat. Since the State of New York has dominion over the funds, the State of Russia cannot have such dominion, and having no such dominion it cannot legally claim title by its own confiscation decrees and so set at naught the holdings of the highest court of the State of New York to the effect that the funds must be distributed among the creditors and shareholders of the Company. So also this Court in *Burnet* v. *Brooks* (288 U. S. 378) held that securities actually present in this country have a situs here; that the maxim *mobilia*

sequuntur personam is at most a fiction which must yield to the facts and circumstances of cases which require it; and that "the question who is the owner of the paper depends upon the law of the place where the paper is" (p. 399). The securities here in question and the proceeds of the sale thereof have always had a business situs in the State of New York. They were completely localized in this country (*De Ganay* v. *Lederer* (250 U. S. 376). The cases cited by petitioner in connection with its argument to the effect that the funds have a legal situs in Russia have thus no application.

In the course of its argument, under the heading as above set forth, petitioner makes certain statements and certain arguments which are not supported by the authorities cited or by other authority.

It is stated, at pages 3 and 4 of the supplement to petition, that it was the duty of the Superintendent of Insurance under the laws of New York to transmit the surplus funds remaining after payment of domestic policyholders and creditors, to "the Liquidation Commission appointed by the Soviet decree." On the contrary, the highest court of the State of New York has held that the Superintendent of Insurance should not remit funds to a foreign liquidator where it appears that the foreign liquidator will not deal justly with such funds. Thus in *Martyne* v. *American Union Fire Insurance Co.* (216 N. Y. 183), the title of the statutory liquidator of a dissolved Pennsylvania insurance company was recognized as to New York assets because it was a title in trust for creditors and so in harmony with the New York law. The court expressly stated, however, at page 192, that the title of foreign

statutory assignees is recognized and enforced only "where it can be without injustice." Likewise, in *Matter of People* (*City Equitable Fire Insurance Co.*), 238 N. Y. 147, 157, and *Matter of People* (*Norske Lloyd Ins. Co.*), 242 N. Y. 148, 165, et seq., the New York Court of Appeals points out that under the provisions of the insurance law of the State, funds of a foreign insurance company deposited with the Superintendent of Insurance are held not only for the primary benefit of local creditors, but secondarily for the benefit of all the creditors and stockholders of the Company wherever they may be, and that surplus funds will be turned over to a foreign liquidator only where it appears that such foreign liquidator will deal justly and fairly with such surplus funds.

At pages 4 and 5 of the supplement to petition, in its long quotation from the case of *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, 427, cited to give support to petitioner's argument to the effect that the courts of New York had no further jurisdiction with respect to the surplus assets of the Moscow Fire Insurance Company remaining after payment of local creditors, the petitioner deliberately omits from its quotation the only part of the opinion relating to the question of jurisdiction to deal with the surplus funds. The omitted part of the quotation represented by the stars at page 4, reads as follows:

> "We do not say that the refusal to go farther has its origin in what is strictly a defect of jurisdiction. In this instance at all events there are considerations of convenience and efficiency that may be accepted as decisive irrespective of the scope of power."

The quotation by petitioner at page 12 of the supplement to petition from the case of *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, has no application to the instant case of property actually located in the State of New York. In such quotation the Court of Appeals was speaking of the effect of the Soviet decrees in Russia upon property located in Russia and upon obligations to be performed in Russia.

III

The Scope of the Assignment

Respondent rests upon its original brief and the opinion of the district court.

The petition should be denied.

Respectfully submitted,

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October 11, 1935.